

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
MARCH 25, 2009 Session

**WILL MYERS v. HIDDEN VALLEY LAKES TRUSTEES, INC., ET AL.**

**Direct Appeal from the Chancery Court for Hickman County  
No. 08-101C     Robbie Beal, Judge**

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**No. M2008-01677-COA-R3-CV - Filed June 17, 2009**

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In this appeal, we are asked to determine whether the trial court erred in dismissing Mr. Myers' suit against Hidden Valley, finding that Hidden Valley had substantially complied with the requirements of Tennessee Code Annotated section 48-57-201. We affirm the decision of the trial court and award attorney fees to Hidden Valley.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed and  
Remanded**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Will Myers, Nunnely, TN, *pro se*

Brian Casper, Nashville, TN, for Appellee

## OPINION

### I. FACTS & PROCEDURAL HISTORY

Will Myers (“Appellant”) is a homeowner in Hidden Valley Lakes Subdivision in Hickman County, Tennessee. On April 9, 2008, Mr. Myers filed a “Petition for Enforcement of [Tennessee Code Annotated section 48-57-201]” in the Hickman County Chancery Court against Hidden Valley Lakes Trustees, Inc.; Mike Gilliam, President (“Hidden Valley”). Mr. Myers claimed that Hidden Valley, a nonprofit corporation, failed to produce for inspection, the voting membership list for the 2008 Hidden Valley Lakes annual meeting, as required by Tennessee Code Annotated section 48-57-201.<sup>1</sup>

Hidden Valley filed a motion to dismiss, pursuant to Tennessee Rule of Civil Procedure 12.02, claiming that Mr. Myers had failed to state a claim upon which relief could be granted. Specifically, Hidden Valley claimed that Mr. Myers’ action was premature, because a final voting list could not be generated until after May 15th of each year, as voting eligibility was determined by a member’s payment of an annual assessment, which was not due until May 15th. Hidden Valley further claimed that “Mr. Myers was provided with a list of members for inspection by Hidden Valley, on or about April 15, 2008, showing the then current status of the members (whether they had paid their annual assessment) as of that date.” Finally, Hidden Valley contended that “the Complaint will be moot after May 15, 2008[,] because Mr. Myers will have had the opportunity to inspect the final list pursuant to [Tennessee Code Annotated section] 48-57-201(b).”

Mr. Myers filed a Motion for Temporary Restraining Order on May 13, 2008, seeking to enjoin Hidden Valley from conducting its 2008 property owners’ meeting until the suit was decided. Mr. Myers also filed an affidavit stating that despite his written request of “February 5, 200[8],” he had not received a “proper” membership list for inspection and copying as of May 13, 2008.

On May 20, 2008, Mr. Myers filed a Motion for More Definite Statement, asking the court to require Hidden Valley to provide a more definite statement concerning its May 9, 2008 Motion to Dismiss. Specifically, Mr. Myers contended that Hidden Valley’s memorandum of law in support of its motion referenced attached affidavits, which were not attached, and also that the certificate of

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<sup>1</sup> This is the second lawsuit between these parties. In 2006, Mr. Myers brought a petition for writ of mandamus requesting that the trial court order Hidden Valley to conduct business in accordance with Tennessee law and Hidden Valley’s Charter. Mr. Myers raised numerous claims; however, as in this case, he claimed that Hidden Valley failed to provide him with a list of members as required by Tennessee Code Annotated section 48-57-201. The trial court granted Hidden Valley summary judgment concerning Appellant’s claim as to the membership list, and this Court affirmed, finding that Hidden Valley provided to Appellant such list as required by Tennessee Code Annotated section 48-57-201. *Myers v. Hidden Valley Lakes Trustees, Inc.*, No. M2007-01650-COA-R3-CV, 2008 WL 3068996, at \*1-3 (Tenn. Ct. App. July 31, 2008).

service did not correctly list his address.<sup>2</sup> The trial court entered an Order requiring Hidden Valley to file the affidavit of Martha Page, as referenced in its memorandum of law, within ten days.<sup>3</sup>

On May 20, 2008, Hidden Valley filed the Affidavit of Sheila Adkerson, as a Trustee and Secretary of Hidden Valley's Trustee Board. Attached to the affidavit was a "complete and up-to-date membership list for 2008" as of May 19, 2008. Mr. Myers does not dispute receiving the May 19, 2008 list.

Mr. Myers, on June 9, 2008, filed a document styled "Petitioner's Opposition to Respondent's Rule 12.02 Motion to Dismiss with Affidavit." As an exhibit to this document, Mr. Myers attached an "Analysis of Respondent's Report of Paid Property Owners Consisting of Pages 1 of 2266 Thru 16 of 2266 Inclusive" ("Analysis").<sup>4</sup> Also on June 9, 2008, Mr. Myers filed a Motion for Judgment on Pleadings with Accompanying Affidavit, again claiming that to date, Hidden Valley had failed to produce a "proper" membership list.

On June 20, 2008, the chancery court entered an Order Granting Motion to Dismiss. The order stated that on June 17, 2008, the parties appeared before the court. "Based on the pleadings and the evidence provided to the Court and the statements of pro se Petitioner and counsel for the Respondent," the Court granted Hidden Valley's motion to dismiss. The court found that "the membership list was provided to the Plaintiff and that the list was in substantial compliance with the law."

Mr. Myers filed a Notice of Appeal to this Court on July 17, 2008. He was granted leave to proceed on appeal as a poor person by the chancery court. Mr. Myers filed a Notice of "No Transcript" on July 29, 2008.

On November 20, 2008, Hidden Valley filed, with this Court, a Motion and Memorandum in Support of Motion for Consideration of Post-Judgment Facts, asking this Court to consider a June 24, 2008 cover letter, a June 18, 2008 membership list, and a second affidavit of Sheila Adkerson with an attached current membership list. Hidden Valley claims that these post-judgment facts demonstrate the mootness of Mr. Myers' appeal. Mr. Myers opposed Hidden Valley's motion. On December 17, 2008, this Court entered an Order reserving judgment pending oral argument.

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<sup>2</sup> The Memorandum of Law in Support of Respondent's Rule 12.02 Motion to Dismiss has not been included in the Record before us.

<sup>3</sup> On May 22, 2008, Hidden Valley refiled its Motion to Dismiss correcting Mr. Myers' address on the certificate of service. However, it is unclear from the Record whether the affidavit of Martha Page was filed.

<sup>4</sup> In his document styled "Petitioner's Opposition to Respondent's Rule 12.02 Motion to Dismiss with Affidavit" filed June 9, 2008, Mr. Myers references Sheila Adkerson's Affidavit and attached membership list. Although Mr. Myers states that the membership list is paginated "1 of 2266 Thru 16 of 2266 Inclusive," we do not find a list with such pagination in the Record, and therefore, presume Mr. Myers refers to the June 9, 2008 list, paginated "1 of 1150" to "34 of 1150."

## II. ISSUES PRESENTED

Appellant has timely filed his notice of appeal and presents the following issues for our review, restated as follows:

1. Whether the trial court erred in dismissing Mr. Myers' claim, finding that the membership list provided by Hidden Valley substantially complied with the law; and
2. Whether Mr. Myers was denied substantive due process pursuant to article I, section 17 of the Tennessee Constitution.

Additionally, Appellee presents the following issue for review, restated as follows:

3. Whether Mr. Myers' appeal is moot and frivolous, such that Hidden Valley should be awarded its costs and attorney fees incurred on appeal.

For the following reasons, we affirm the decision of the chancery court. We award attorney fees to Hidden Valley.

## III. STANDARD OF REVIEW

Although Hidden Valley filed a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(6) for failure to state a claim upon which relief could be granted, we find that the trial court converted this motion into a motion for summary judgment by considering matters outside of the pleadings.<sup>5</sup> *See Patton v. Estate of Upchurch*, 242 S.W.3d 781, 786 (Tenn. Ct. App. 2007). In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330, 337 (Tenn. 2005), our Supreme Court restated the applicable standard of review when appellate courts review a motion for summary judgment. The court stated:

The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view

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<sup>5</sup> We note that Appellant did not file a transcript in this case. The trial court's Order Granting Motion to Dismiss, entered June 20, 2008, states only that it is "[b]ased upon the pleadings and the evidence provided to the Court and the statements of pro se Petitioner and counsel for the Respondent." However, because the trial court found that "the membership list was provided to the Plaintiff and that the list was in substantial compliance with the law[.]" we find that it must have considered the Affidavit of Sheila Adkerson and the attached May 19, 2008 List, which were filed with the court on May 20, 2008. Additionally, Hidden Valley's brief states that the trial court reviewed "[t]he Membership List[.]"

all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *See Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

*Id.* In this case, Hidden Valley bears the burden of proving that no genuine and material issues of fact exist, such that it is entitled to a judgment as a matter of law. *See Byrd*, 847 S.W.2d at 211.

#### **IV. DISCUSSION**

##### ***A. Substantial Compliance***

On appeal, Mr. Myers asserts that the chancery court erred in dismissing his claim, finding that the membership list submitted by Hidden Valley substantially complied with the law. Mr. Myers claims that the membership list provided by Hidden Valley did not substantially comply with Tennessee Code Annotated section 48-57-201, which, concerning the membership lists of nonprofit corporations, provides the following:

(a) After fixing a record date for a notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of a meeting. The list must show the address and number of votes each member is entitled to vote at the meeting. The corporation shall prepare on a current basis through the time of the membership meeting a list of members, if any, who are entitled to vote at the meeting, but not entitled to notice of the meeting. The list shall be prepared on the same basis and be part of the list of members.

(b) The list of members must be available for inspection by any member for the purposes of communication with other members concerning the meeting, beginning two (2) business days after notice is given of the meeting for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held. A member, a member's agent, or attorney is entitled on written demand to inspect and, subject to the limitations of §§ 48-66-102(c) and 48-66-105, to copy the list, at a reasonable time and at the member's expense, during the period it is available for inspection.

(c) The corporation shall make the list of members available at the meeting, and any member, a member's agent, or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a member, a member's agent, or attorney to inspect the list of members before or at the meeting (or copy the list as permitted by subsection (b)), a court of record having equity jurisdiction in the county where a corporation's principal office (or if non in this state, its registered office) is located, on application of the member, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to make available the members' list does not affect the validity of action taken at the meeting.

**Tenn. Code Ann. § 48-57-201 (2002).** Essentially, the statute requires the preparation of an alphabetical list of the names, addresses, and number of votes of the nonprofit corporation's members entitled to notice of, or to vote at, the non-profit corporation's meeting.

Mr. Myers alleges that the "membership list" contained "gross errors and omissions." The alleged errors are as follows:

a. A blatant error is exemplified in that the total [number] of lots owned is not 2424 lots as stated. The total [number] of lots owned in the subdivision 3,871.  
A gross error of 1447 lots.

b. A blatant error is exemplified in that the 1876 lots paid total column calculated at \$125.00 per lot would yield in excess of \$234,000.00 while Respondent's report lists total payments at less than \$160,000.00  
A gross error of about \$74,000.00

c. A blatant error is exemplified in that the number of lots paid does not add up to the 1876 lots total listed. It does add up to 1073 lots.  
A gross error of 803 lots.

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d. A blatant error is exemplified in that the 2008 payments column does not add up to \$157,351.18. It does add up to \$154,311.13.  
A gross error of \$3[,]000.00

e. A blatant error is exemplified in that names are not alphabetical[ly] indicated in numerous non-alphabetical entries.

f. The list is not a computer generate[d] list with auto sums, but is only prepared in a format that appears to be a spreadsheet.

Mr. Myers does not identify the date of the membership list which he alleges contains the above-mentioned errors. However, he states that such errors are referenced in his Analysis, which is titled “Analysis of Respondent’s Report of Paid Property Owners Consisting of Pages 1 of 2266 Thru 2266 Inclusive.” As we noted above, the Record does not contain a membership list with the pagination Mr. Myers cites. The only membership list included in the Record that was allegedly available to Mr. Myers pre-judgment, is paginated “1 of 1150” through “34 of 1150.”<sup>6</sup> Such list was attached to the Affidavit of Sheila Adkerson, which states that it was prepared on May 19, 2008 (“May 19, 2008 List”). Even assuming that Mr. Myers intended to reference the May 19, 2008 List, we cannot determine whether it contains the errors he alleges, as the May 19, 2008 List contained in the Record before us is copied in such a way that the columns titled “Map-Grp-Par-BK-Lot-Road,” “Lots Owned,” “# Lot[s] Pd,” and “2008 Payments” have been “cut off” and cannot be read.

“It is the duty of the appellant to prepare a fair, accurate, and complete record on appeal.” *State v. Climer*, No. M2007-01670-CCA-R3-CD, 2008 WL 1875155, at \*2 (Tenn. Crim. App. 2008) (citing Tenn. R. App. P. 24(b)). “When necessary parts of the record are not included, we must presume that the trial court’s ruling is correct.” *Id.* (citing *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991)). Because relevant portions of the membership list have been omitted, we cannot determine whether it contains errors (a) through (d) alleged by Mr. Myers. Thus, the only alleged errors raised by Mr. Myers that can be reviewed are errors (e) and (f)—alphabetization of the list and the lack of “auto sums.”

“‘Substantial compliance’ has been defined as ‘actual compliance in respect to the substance essential to every reasonable objective of the statute.’” *Morrow v. Bobbitt*, 943 S.W.2d 384, 389 (Tenn. Ct. App. 1996) (quoting *Stasher v. Harger-Haldeman*, 372 P.2d 649, 652 (Cal. 1962)). “[T]here has been substantial compliance . . . when there has been a partial compliance and when it is reasonable to conclude that the objective sought by the [statute] has been fully attained thereby, as a practical matter, as though there has been a full and literal compliance.” *Id.* (quoting *Opinion of the Justices*, 275 A.2d 558, 562 (Del. 1971)). Therefore, “‘when there is such actual compliance as to all matters of substance then mere technical imperfections of form or variations in mode of expression . . . or such minima as obvious typographical errors, should not be given the stature of non-compliance[.]’” *Id.* (quoting *Stasher*, 372 P.2d at 652).

Tennessee Code Annotated section 48-57-201 requires a nonprofit corporation to prepare a list of its members entitled either to notice of, or to vote at, its meeting. The statute states that such list shall be alphabetized by name. **Tenn. Code Ann. § 48-57-201**. However, we find no requirement that the list be a “computer generate[d] list with auto sums” as Mr. Myers suggests. In addition, our review of the May 19, 2008 List reveals that of the approximate 1,723 names listed, only approximately 66 are not in alphabetical order. We find that this “technical imperfection,” *see*

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<sup>6</sup> Two additional membership lists are included in the post-judgment facts urged by Hidden Valley. One list was allegedly prepared on June 18, 2008, and the other states that it is “current” as of November 3, 2008.

*Morrow*, 943 S.W.2d at 389 (quoting *Stasher*, 22 Cal. Rptr. at 660, 372 P.2d at 652), does not thwart the statute’s purpose, and therefore, find that Hidden Valley substantially complied with the statute’s alphabetization requirement. Next, we must determine whether such compliance warranted dismissal of the case.

Hidden Valley bears the burden of proving that “there are no disputed, material facts creating a genuine issue for trial . . . and that [it] is entitled to judgment as a matter of law.” ***Hannan v. Alltel Publ’g Co.***, 270 S.W.3d 1, 5 (Tenn. 2008) (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). Hidden Valley “must either affirmatively negate an essential element of the nonmoving party’s claim or establish an affirmative defense.” ***Id.*** (citing *Byrd*, 847 S.W.2d at 215 n.5). Once Hidden Valley makes a properly supported motion, the burden of production shifts to Mr. Myers to prove the existence of a genuine issue of material fact. ***Id.*** (citing *Byrd*, 847 S.W.2d at 215). Mr. Myers may prove such factual disputes warranting a trial

(1) by pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) by rehabilitating evidence challenged by the moving party, (3) by producing additional evidence that creates a material factual dispute, or (4) by submitting an affidavit in accordance with Tenn. R. Civ. P. 56.08 requesting additional time for discovery.

***Ferguson v. Nationwide Prop. & Cas. Ins. Co.***, 218 S.W.3d 42, 48 (Tenn. Ct. App. 2006) (citing *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd*, 847 S.W.2d at 215 n.6). If Mr. Myers fails to carry his burden, summary judgment should be granted in favor of Hidden Valley, as the “failure of proof concerning an essential element of a cause of action necessarily renders all other facts immaterial.” ***Id.*** (quoting *Alexander v. Memphis Individual Practice Ass’n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Strauss v. Wyatt, Tarrant, Combs, Gilbert & Milom*, 911 S.W.2d 727, 729 (Tenn. Ct. App. 1995)).

Hidden Valley points out that Tennessee Code Annotated section 48-57-201 does not require the membership list to contain financial information, nor does it require the list be “computer generate[d]” with “auto sums[.]” Therefore, Hidden Valley’s only potential non-compliance lies in its mis-alphabetization of 66 out of the over 1700 names listed. We find that Hidden Valley’s alphabetization mistake does not render the list “non-compliant,” and that Hidden Valley has successfully negated an essential element of Mr. Myers’ complaint—that Hidden Valley failed to comply with the statutory requirements. ***See Myers***, 2008 WL 3068996, at \*3. Mr. Myers has failed to prove the existence of a genuine issue of material fact; therefore, summary judgment as to his claim was appropriate.



### ***B. Due Process***

Mr. Myers attempts to argue that Hidden Valley's alleged failure to provide a membership list in compliance with Tennessee Code Annotated section 48-57-201 violated his right to due process of law under the Tennessee Constitution. This issue was not raised before the trial court, and thus, is waived on appeal. *See Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991).

Furthermore, taking into account that Mr. Myers is a pro se litigant, we find that Mr. Myers has failed to present a sufficient argument concerning this issue. Tennessee Rule of Civil Procedure 27(a) provides that an appellant's brief

shall contain . . . [a]n argument, which may be preceded by a summary of argument, setting forth the contention of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on[.]

“The failure of a party to cite to any authority or to construct an argument regarding his position on appeal constitutes waiver of that issue.” *Boggs Kurlander Steele, LLC v. Horizon Commc'ns*, No. M2006-00018-COA-R3-CV, 2008 WL 490628, at \*4 (Tenn. Ct. App. Feb. 21, 2008) (citing *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 402 (Tenn. Ct. App. 2006); *see also Rector v. Halliburton*, No. M1999-02802-COA-R3-CV, 2003 WL 535924, at \*9 (Tenn. Ct. App. Feb. 26, 2003) (per curiam); *Rhea County v. Town of Graysville*, No. E2001-02313-COA-R3-CV, 2002 WL 1723681, at \*7 (Tenn. Ct. App. July 25, 2002)).

On appeal, Mr. Myers' brief states only that

Mr. Myers is entitled to a proper membership list pursuant to [Tennessee Code Annotated section] 48-57-201[.] Since a proper membership list has not been received[,], Mr. Myers has not had the opportunity to access the content of the proper membership list and has not received due process of law pursuant [to article I, section 17, of the Tennessee Constitution[.]

These statements do not provide the “argument” and “citation to the authorities” required by Tennessee Rule of Appellate Procedure 27(a). Thus, we find, under Tennessee Rule of Appellate Procedure 27(a), that Mr. Myers has waived his right to have the issue of due process considered by this Court.

### ***C. Attorney Fees on Appeal***

Hidden Valley seeks an award of attorney fees on appeal, contending that Mr. Myers' appeal is frivolous. Tennessee Code Annotated section 27-1-122 provides:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

The decision to award damages for the filing of a frivolous appeal rests solely in the discretion of this Court. *Whalum v. Marshall*, 224 S.W.3d 169, 180-81 (Tenn. Ct. App. 2006) (citing *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn. 1985)). "Successful litigants should not have to bear the expense and vexation of groundless appeals." *Id.* (quoting *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977)). An appeal is frivolous when it has "no reasonable chance of success," or is "so utterly devoid of merit as to justify the imposition of a penalty." *Id.* (citing *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978); *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999)). We exercise our discretion under this statute sparingly so as not to discourage legitimate appeals. *Id.*

In determining whether this appeal is frivolous, we bear in mind that Mr. Myers is proceeding as a pro se litigant. Therefore, we must "take into account that many *pro se* litigants have no legal training and little familiarity with the judicial system." *Conner v. Magill*, No. W2003-01988-COA-R3-CV, 2004 WL 1869957, at \*4 (Tenn. Ct. App. Aug. 18, 2004) *perm. app. denied* (Jan. 25, 2005), (quoting *Young v. Barrow*, 130 S.W.3d 59, 62 (Tenn. Ct. App. 2003)). However, we must also ensure that we are not unfair to the opposing party. *Id.* (citing *Young*, 130 S.W.3d at 62). Because Mr. Myers appeal had "no reasonable chance of success," see *Whalum*, 224 S.W.3d at 180-81, we grant Hidden Valley's request for attorney fees based on a frivolous appeal.

### **V. CONCLUSION**

For the aforementioned reasons, we affirm the decision of the chancery court. Because our holding in this case does not depend on the proffered post-judgment facts, we deny Hidden Valley's motion to consider such as moot. Further, we find that Hidden Valley is entitled to recover its reasonable attorney fees incurred on appeal, and remand for determination of an appropriate fee. Costs of this appeal are taxed to Appellant, Will Myers, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.